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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE STATE OF MONTANA, ET AL.,
Petitioners

v.

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CROW TRIBE

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BRIEF FOR THE CROW TRIBE

STATEMENT

The Crow Tribe adopts the United States' preliminary paragraphs, and its Statement of Facts, with the following additions.

By way of prologue, we would point out the overwhelming importance of the streambed issue. The real concerns of the Tribe and the local citizens have almost entirely to do with sports fishing in the Big Horn River below the dam, and duck hunting on the surface of and over the Big Horn River (there is not much real concern about other types of hunting and fishing). Both of these concerns will be settled if this Court concludes that the United States holds the bed in trust for the Tribe, because the Tribe would then have the clear power to exclude non-Indians from the River, and violators would face federal prosecution under 18 U.S.C. § 1165. The streambed issue is argued in Section I below.

On the other hand, if the Tribe is not the beneficial owner of the streambed, then it may still have the power

to ban hunting and fishing, enforceable by civil remedies, because of its special property right in the fish and game on the reservation, or because of its inherent sovereign powers to regulate activities on the reservation. These are argued in Section III below.

The Tribe wishes to emphasize the chronological sequence of events.[1] The first formal relations between the United States and the Crow Tribe occurred in the Treaty of 1825, 7 Stat. 266, J. App. II, 26. The next occurred in the Fort Laramie Treaty of 1851, 11 Stat. 749, Pet. App. 83. At this time emigrants were passing through the Crow country, but there were no white settlements. The country recognized by the United States as the Crows' encompassed over 38,000,000 acres, 81 Ct. Cl. at 247, which is the equivalent of a tract 300 miles by 200 miles.

In 1864 the white influx into the region had become sufficient that the Territory of Montana was created, including within it the Crow country. The Territorial Act declared (13 Stat. 85, Pet. App. 37):

> ". . . *Provided, further,* That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians . . . ."

By 1868 miners and settlers had invaded the Crow country, and to relieve the tension the United States

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[1] Histories of the Crow Tribe may be found in the testimony of the tribal historian, Joe Medicine Crow, J. App. I, 35-37; *United States* v. *Powers*, 305 U.S. 527, 528-531 (1939); *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 242-257 (1935); *Crow Tribe* v. *United States*, 284 F.2d 361, 364-67 (Ct. Cl. 1960), *cert. den.*, 366 U.S. 924; *Crow Tribe* v. *United States*, 3 Ind. Cl. Comm. 147, 159-164 (1954), and 6 Ind. Cl. Comm. 112, 113-116 (1958); and in the first opinion of the court below, Pet. App. 69-74.

procured the cession of over three-quarters of the Crow country. The remainder, about 8,000,000 acres, was—

> "set apart for the absolute and undisturbed use and occupation of the Indians . . . and the United States now solemnly agrees that no persons [with exceptions not relevant] . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ." Treaty of 1868, 15 Stat. 649, Pet. App. 89.

"Ever" turned out to be less than five years. Because of wholesale trespasses by miners and others, the United States in 1873 negotiated another cession, whereby the Crows would have removed to an even smaller reservation. This agreement, however, was never ratified by Congress. See details, pp. 21-24 below.

In 1889, Montana became a state. Section 4 of the Statehood Act, 25 Stat. 676, provided that the people of the state—

> ". . . forever disclaim all right and title . . . to all lands lying within [the state] . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ."

In 1920 Congress passed the Crow Allotment Act, 41 Stat. 751, Pet. App. 105-118. This Act is the basic framework for the modern status of the reservation. It called for allotment of the non-mountainous land among the Crow Indians. Pet. App. 105-6. Minerals were reserved to the Tribe for fifty years. Pet. App. 109. Lands capable of water power development were to be reserved to the Tribe. Pet. App. 112. Provisions were made rela-

tive to cattle ranching and irrigation of farmland. Secs. 8 and 11, Pet. App. 110-15. Allotments (except for competent Indians) were to be held in trust for 25 years, Pet. App. 106, since extended indefinitely, 25 U.S.C. § 462.

After allotments the remaining lands were *not* opened to settlement or homesteading, as had happened on other reservations, see *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). However, non-Indians could buy an allotment if the allottee had been declared competent and owned his allotment in fee and wished to sell, or could buy (in fee) a trust allotment with the consent of the allottee and the Secretary of the Interior. Pet. App. 106, 116. Certain tribal lands were "granted" by Congress to the State for school purposes, Pet. App. 117, and the State could sell these to non-Indians. The Tribe could not alienate land. Fee patents could be converted back to trust for land exchange and consolidation purposes. Sec. 14, Pet. App. 116, see also 25 U.S.C. § 465.

The 1920 Act also recognized the Crow Tribal government:

> "Sec. 18. That the sum of $10,000, or so much thereof as may be necessary, of the tribal funds of the Crow Indians of the State of Montana, is hereby appropriated *to pay the expenses of the general council, or councils, or business committee, in looking after the affairs of said tribe*, including the actual and necessary expenses and the per diems paid its legislative committee when visiting Washington on tribal business at the request of the Commissioner of Indian Affairs or a committee of Congress, said sum and the actual and necessary expenses to be approved by and certified by the Secretary of the Interior, and when so approved and certified to be paid: *provided*, That not to exceed $2,500 shall be ex-

pended in any one fiscal year." Pet. App. 118, emphasis added.

While virtually all of the riparian land below the Yellowtail Dam has been allotted to tribal members (the only exceptions being a few small tribal parcels), J. App. I, 70, the fact is that only a few allotments have been sold out of Indian ownership, such as the ones the State owns. Pet. Br. App. 25. The Crow Reservation and the Crow tribal government are fully functioning institutions.

It is true that the State and some private landowners did some stocking of fish and small game on the reservation, but this was not done with tribal permission. J. App. I, 54. The Bureau of Indian Affairs did some stocking of buffalo and elk. *Id.* 54-55, 98. The Tribe stocks fish under the supervision of the U.S. Bureau of Sports Fisheries and Wildlife. J. App. II, 83-85, Tr. 68-69. The Bureau itself also stocks fish. J. App. I, 84.

A major question at trial was the extent to which the Crows traditionally fished. The trial court found that "fishing was not a central part of the Crow diet." Pet. App. 32.[2] The Tribe takes no exception to this finding other than to note that the Crows did eat fish to supplement their main diet of buffalo meat, J. App. I, 39, 90, 97, and continue to fish in modern times for personal use, *id.*, 50, 53-54.

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[2] The court (Pet. App. 32) found that the first written reference to fishing and the Crow Indians (the cite is apparently J. App. II, 112) occurred at a negotiation meeting that resulted in a further cession of the Crow Reservation in 1882. That this was the first reference is true only if the reference to fishing in the 1851 Treaty is ignored, Pet. App. 86, Art. 5, and see also reference to fish in 1867, p. 20 below. The meeting referred to by the trial court was apparently the negotiation meeting for the unratified treaty of 1873, 4 Kapp. 1142. This had nothing to do with the cession of 1882, 22 Stat. 42. See Royce, *Indian Land Cessions* 864 (1900). Petitioners make the same error, Pet. Br. 4.

There is also evidence in the record that the Big Horn River had religious and cultural significance to the Tribe. The bed of the river provided sea shells which were used as medical cures. Testimony of Old Coyote, J. App. I, 97-98. Rocks in the bed were used for heating sweat lodges and for body purification. *Id.* In a story handed down to Henry Old Coyote, which constitutes an oral history of the Tribe, there is a legendary account of how one of the great leaders of the Tribe was rescued by the Big Horn Sheep of the Big Horn River, who told him that if the name of the river was ever changed there would be no more Crow. J. App. III, 193. This leader, Big Metal, is believed to be buried under the bed of the Big Horn River. J. App. III, 196.

SUMMARY OF ARGUMENT

I

It is undisputed that the United States has the power to grant the beds of navigable streams to Indian tribes. The question is only whether the United States intended to do so. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

Examining the negotiations and surrounding circumstances of the 1851 and 1868 Treaties, and the disclaimers by the Territory and State of Montana, the conclusion is inevitable that the Crow case cannot be distinguished from the Choctaw case, and that therefore the Crow Tribe owns the bed within its present day Reservation. The summary list of factors supporting this conclusion appears at pp. 28-29 below.

II

The Tribe's ownership of the bed carries up to the high water mark, not merely the low water mark, because the individual Indians' allotments of the upland

only carried down to the high water mark, and they could convey to their purchasers no more than they owned.

III

The Tribe may prohibit non-Indians from hunting and fishing anywhere on the reservation, including fee land.

A. The Tribe owns the exclusive right to take game and fish on the reservation, and for non-Indians to hunt or fish on the reservation without tribal permission is an infringement of that property right. See *United States* v. *Winans*, 198 U.S. 371 (1905); *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954). The right arises from the express hunting and fishing right mentioned in the 1851 Treaty, coupled with the original exclusive ownership of the reservation, and the original hunting and fishing economy therein, and continues throughout the reservation even though individual parcels of land are sold out of Indian ownership. The one exception is the one declared by the court below, that people who live on fee land on the reservation cannot be barred from hunting and fishing *on their own land* (but they may be reasonably regulated).

B. Alternatively, the Tribe as the sovereign government of the reservation has civil jurisdiction to regulate hunting and fishing throughout the reservation, including on fee land, and this jurisdiction includes the power to bar all hunting and fishing by non-Indians for reasons of conservation, except, again, for fee land residents.

IV

Crow Tribal Resolution 74-05 neither deprives non-Indians of Fifth Amendment guarantees nor does it violate the Indian Civil Rights Act.

V

The court below did not act contrary to F.R.C.P. 52 (b) in reviewing the district court's findings.

ARGUMENT

I. THE CROW TRIBE OWNS THE BED OF THE BIG HORN RIVER

In Section A of Part I we argue that the United States has the power to grant the beds of navigable streams to Indian tribes (or more precisely, in this case, recognize the Crow Tribe's pre-existing ownership of such beds). The question is what the United States intended, and that may be construed according to what the Tribe understood, following well settled canons of construction.

In Section B we analyze the facts and surrounding circumstances of the Treaties of 1851 and 1868, which show clearly that the Tribe would have understood that its territory being recognized or granted by the Treaties included the streambeds, and the United States cannot honorably have entertained any contrary thought.

In Section C we discuss other relevant legislation, including the Montana Territorial and Statehood Acts, which require Montana to disclaim any title to Indian lands, and the statutes of 1882 and 1891, which use terms such as "the mid-channel" to run reservation boundaries.

In Section D we sum up the reasons why the Court must conclude that the Tribe owns the streambed.

A. The Bed of a Navigable River Can Be Conveyed to an Indian Tribe, If That is What the U.S. Intended

It is a well established principle that beds of navigable rivers can be granted away before the territory in which they are located becomes a state. Although it was stated in *Pollard's Lessee* v. *Hagan*, 44 U.S. 212, 220-230 (1845), that there could not be an alienation of lands

beneath navigable rivers, this Court recognized just five years later that this statement was less than absolute. In *Goodtitle* v. *Kibbe*, 50 U.S. 471 (1850) this Court determined that Congress could have granted the land to a private patentee before Alabama became a state.

In *Shively* v. *Bowlby*, 152 U.S. 1 (1894), this Court further delineated the rule that grants of lands underlying navigable waters could be conveyed prior to statehood and set up some general guidelines under which such a grant could be made:

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below the high water mark of navigable waters in any Territory of the United States whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." 152 U.S. at 48.

It is important to realize that while this body of law was developing with respect to title to riverbeds, this Court was also considering the nature of Indian title to the lands set out for them by Congress in treaty or statutes; lands that in most instances included by metes and bounds description navigable rivers and the beds beneath them. In 1823, Chief Justice Marshall, *Johnson* v. *McIntosh*, 21 U.S. 543, 574 (1823), stated that the Indians' title, by virtue of their occupancy of American land, gave them "a legal as well as just claim to retain possession of it." He added, however, that the United States could extinguish the Indian interest by purchase.[3] The princi-

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[3] *Id.* at 583. This principle was reaffirmed by this Court in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667 (1974).

ple of Indian title set forth in *McIntosh* was further expounded on in *Worcester* v. *Georgia*, 31 U.S. 515 (1832), where it was said that the State of Georgia could not exercise jurisdiction over Indian lands, *i.e.*, that Indian title could not be ignored by a state.

Thus, these early cases recognized the validity of Indian title against all but the discovering nation and the necessity of purchasing such title in order to validly extinguish it. It is noteworthy that both *McIntosh* and *Worcester* were the state of the law with regard to Indian title at the time of *Martin* v. *Waddell*, 41 U.S. 367 (1842), and *Pollard*, which are relied on so heavily by the Petitioners and their amici curiae.[4]

In *United States* v. *Winans*, 198 U.S. 371, 379 (1905), the Indians ceded land, but retained fishing rights at their usual places in the ceded area. The question was whether a treaty reserved to the Indians an easement across privately owned land to enable the Indians to reach their usual places. The treaty was silent, and so were the patents issued by the U.S. to the private owners. The Court stated:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.*" 198 U.S. at 380, emphasis added.

The *Winans* case is relevant because it emphasizes the true nature of the transaction when Indians cede land

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[4] *Pollard* is also distinguishable because it involves a grant after Alabama became a state.

to the U.S.—the U.S. only acquires what the Indians agree to give up.[5] If the Indians do not give up the beds of rivers in their land, the U.S. does not acquire them, at least not free of the Indians' title.

In 1918, in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), this Court ruled that beds underlying navigable waters were included within the bounds of an Indian reservation even though no specific mention of the beds was made.[6] The standard to be used in determining whether a grant was made was to be examination of the circumstances and the intent of Congress in making the treaty. The Court said:

> "As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the solution and needs of the Indians and the object to be attained.
>
> "That Congress had the power to make the reservation inclusive of the adjacent waters needs little more than statement." 248 U.S. at 87.

In *Donnelly* v. *United States*, 228 U.S. 243 (1913), an Executive Order created an Indian reservation described as "a tract of country one mile in width on each side of the Klamath River" and about 40 miles long. The Court held that the government intended to include the riverbed in the reservation, although no specific mention of it was made: "[I]t would be absurd to treat the [Execu-

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[5] See also, *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942).

[6] It is not inconsistent to grant the bed of navigable waters to an Indian tribe while reserving the federal navigation servitude. *Moore* v. *United States*, 157 F.2d 760, 765 (9th Cir. 1946); *United States* v. *Pollmann*, 364 F. Supp. 995, 1000 (D. Mont. 1973). The court below so held, Pet. App. 74.

tive] order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river." 228 U.S. at 259.

These holdings are in line with an extensive body of lower court case law.[7]

On the other hand, this Court held in one case, *United States* v. *Holt State Bank*, 270 U.S. 49 (1926), that disposal of land underlying navigable waters was not to be regarded as intended unless the intention was definitely declared or otherwise made very clear. In that case, the Red Lake Chippewas ceded by treaties ending in 1855 all but a section of their aboriginal territory. They continued to hold the remaining section, but there never was any formal grant of that section to them. In that section was a lake. Minnesota became a state in 1858. In 1863 the Red Lake Reservation was impliedly recognized as a reservation in a treaty of cession, 13 Stat. 667. In

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[7] In *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942), the court held that the Flathead Tribe owns the bed of Flathead Lake to the extent it lies within the reservation boundaries, though the treaty said nothing about the bed. This was followed in *United States* v. *Pollmann*, 364 F. Supp. 995 (D. Mont. 1973).

United States v. *Romaine*, 255 F. 253 (9th Cir. 1919), held that the Lummi Reservation included the tidelands adjacent to the Reservation, though the grant was silent on the issue. Followed, *United States* v. *Stotts*, 49 F.2d 619 (W.D. Wash. 1930).

In *Taylor* v. *United States*, 44 F.2d 531 (9th Cir. 1930), *cert. den.*, 283 U.S. 820, the court, thinking that the Quileute Reservation was established after Washington became a state, held that the bed of the Quileute River within the reservation belonged to the state, not the Tribe. Consequently, a non-Indian could anchor a barge on the bed of the river within the reservation. However, the court later discovered that the Quileute Reservation had been established *before* Washington became a state, and reversed its ruling. *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), *cert. den.*, 330 U.S. 827. And see *Antoine* v. *Washington*, 420 U.S. 194, 200-204 (1975), holding that *even after statehood* Congress can create Indian property rights (off-reservation hunting rights) which are exempt from state regulatory power.

1889 the Red Lakes ceded their reservation, including the lake, to the United States, which in turn sold the land to homesteaders. The lake was drained around 1912 and the riparian homesteaders took possession, assuming that the former bed passed to them under state law. Around 1923 the United States sued for a judgment that it and not the homesteaders owned the former lake bed. This Court held that the homesteaders owned the bed.

The question was what effect the treaties, by which the Red Lakes ceded all but the one remaining section of land, had on the stream beds in that remaining section. If the treaties amounted to a pre-1858 recognition of the Indians' aboriginal ownership of the bed, then Minnesota did not take title to the bed in 1858, and the United States acquired the bed from the Red Lakes in 1889. This Court said (270 U.S. at 58-59):

> "There was nothing in this [the series of treaties ending in 1855] which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State."

This then was the state of the law when this Court decided *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). In that case the Choctaw and other tribes had ceded their aboriginal lands east of the Mississippi, and the U.S. granted them new lands to the west, through which ran the Arkansas River, a navigable stream. Many years later, the tribes agreed to allot their lands to their members, and to terminate tribal affairs. Oklahoma then became a state. Since the reservations had been terminated, Oklahoma assumed it owned the streambed of the Arkansas, and for many years it received income from mineral leases therein.

In 1966 the Indians claimed ownership of the Arkansas bed. This Court agreed. This Court reaffirmed the *Shively* rule that the United States can dispose of

lands underlying navigable waters, and held that the question was whether the United States intended to do so when it granted the reservations to the tribes. 397 U.S. at 633. This Court held that this was indeed the intent, based on the following factors:

a. Part of the river was surrounded on both sides by the land granted to the Indians. 397 U.S. at 628.

b. There was no explicit exclusion of the bed. *Id.*

c. The Indians did not seek out the U.S.; the treaties were imposed upon them. *Id.* at 630-31.

d. The Indians were promised "virtually complete sovereignty" over their new lands. *Id.* at 635.

e. The Indians were promised that their new lands would never be embraced in any Territory or State. *Id.* at 635.

f. One of the calls dividing the land of one tribe from that of another was "down the main channel of the Arkansas river," implying ownership to the middle of the river. *Id.* at 631.

g. The well settled rule of construction is that treaties will be interpreted as the Indians would have understood them, and doubtful expressions will be resolved in their favor. *Id.* at 631.

h. *Holt State Bank* was distinguished on its facts, as not intending a grant of the bed. *Id.* at 634.

B. The Fort Laramie Treaties of 1851 and 1868 Were Recognitions of the Crow Tribe's Title to the Lands Described Therein, Including the Streambeds

1. *The Fort Laramie Treaty of 1851*

Initially, let us examine the negotiations leading to the Fort Laramie Treaty of 1851, 11 Stat. 749, Pet. App.

83-87. The circumstances as well as the documents surrounding these treaties are set forth in detail in the cases cited in footnote 1 above.

In summary, prior to 1851 costly wars had broken out between the various Indian tribes inhabiting the area, and it was dangerous for settlers trekking westward in search of gold. The government wished to establish peace among the tribes and to obtain safe passage across these lands for the settlers. To accomplish this end an appropriation was made by Congress on February 27, 1851 (9 Stat. 572), to defray expenses of a peace commission. Members of the peace commission were given instructions which included the following:[8]

> "It is important, if practicable, to establish for each tribe some fixed boundaries within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another Tribe without its consent."

Later that year, the tribes in the area gathered at Fort Laramie for the purpose of entering into negotiations with the government's commission. These tribes included the Crows, Sioux of the Missouri River Country, the Assiniboines, Gros Ventres, Mandans, Arickarees, Shoshones, Cheyennes and Arapahoes. The treaty was signed on September 17, 1851. With relation to the Crow, Article V of the Treaty provided:

> ". . . The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone, thence up the Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the headwaters of the Yellow-

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[8] Quoted in *Fort Berthold Indians* v. *United States*, 71 Ct. Cl. 308, 312 (1930).

> stone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the headwaters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the headwaters of Big Dry Creek, and thence to its mouth.
>
> ". . . It is, however, understood that in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing or passing over any of the tracts of country heretofore described."

On the basis of all the circumstances, the Court of Claims in *Crow Tribe* v. *United States, supra*, concluded that the United States by the Fort Laramie Treaty of 1851 recognized title in the Crow Tribe to the lands described in that document. The court said:

> "It is true that the language of the Treaty is not the technical language of recognition of title. Nevertheless, we think that the participation of the United States in a treaty wherein the various Indian tribes describe and recognize each others' territories is, under the circumstances surrounding this treaty, and in light of one of the overriding purposes to be served by the treaty, i.e. securing a free passage for emigrants across the Indians' lands by making particular tribes responsible for the maintenance of order in their particular areas, a recognition by the United States of the Indians' title to the areas for which they are to be held responsible, and which are described as 'their respective territories.'" 284 F.2d at 364.

Also, speeches given at the negotiations by the peace commissioners contained ample reference to the territories as "your country", "your land" and "your territory" to

assure the Indians of their ownership of that area.[9] Similar references were contained in the internal governmental communications on this issue.[10]

It is noteworthy that the *Crow Tribe* decision initially described two methods by which title to Indian lands could be shown. First, the Crow Tribe could show that it had Indian title to the lands, i.e. that it used and occupied the lands from time immemorial.[11] As an alternative, the Crow Tribe could show that the government *recognized* title to the land.[12] The Court in *Crow Tribe*

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[9] *Crow Tribe*, 284 F.2d at 366-67, quoting from an address by Treaty Commissioner Mitchell held at the initial meeting with the Tribes on September 8, 1851.

[10] Letter from Commissioner of Indian Affairs, W. Medill, to the Secretary of Interior, June 15, 1849, quoted in *Crow Tribe*, 284 F.2d at 365. 1849 Report to Secretary of Interior from Commissioner of Indian Affairs, quoted in *Crow Tribe* at p. 366; *cf.* letter from Commissioner of Indian Affairs to Treaty Commissioner Mitchell, May 26, 1851, S. Doc. No. 53, 70th Congress, 1st Sess. (1851), 4 Kapp. 1074-75.

[11] Mere unrecognized Indian title is not compensable when taken by the United States. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 106 n.28 (1949); but it may be sufficient to protect from trespass by outsiders, see *United States ex rel. Hualapai Indians* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 345 (1941).

[12] "By 'recognition' the Courts have meant that Congress intended to acknowledge, or if one prefers, to grant, to Indian tribes rights in land which were in addition to the Indians' traditional use in occupancy rights exercised only with the permission of the sovereign. Those additional rights may be sufficient to spell out fee simple title in the Indians if that is what Congress wished, or they may result in something less than fee simple title. The extent of those new and additional rights in the accompanying obligations of the sovereign and the tribe usually will be determined by Congressional enactment, the treaty, or the agreement, conferring them. Sometimes, as in the case of the Fort Laramie Treaty, it is necessary to look to the negotiations leading up to the treaty

concluded that the Tribe, by virtue of the circumstances surrounding the Treaty of 1851, made the latter showing.[13]

It is this issue of recognition or grant of title that best explains the distinction between the immediate case and the decision of this Court in *United States* v. *Holt State Bank, supra.* In that case, no evidence was found that Indian title to the lands given the Red Lake Band, including the lands underlying Mud Lake, had been recognized. The Court stated:

> "There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein nor any attempted exclusion of others from the use of navigable waters." [14]

2. *The Fort Laramie Treaty of 1868*

In 1867, the United States again approached the Crow Tribe for the purpose of reducing the territory recog-

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and the reports of the treaty commissioners to accurately determine the precise nature and extent of the rights and obligations created by the treaty." *Miami Tribe* v. *United States,* 175 F. Supp. 926, 940 (Ct. Cl. 1959).

[13] The 1851 Fort Laramie Treaty recognized title in the other signatory tribes, as well as the Crows. *Fort Berthold Indians* v. *United States,* 71 Ct. Cl. 308 (1930); *Assiniboine Tribe* v. *United States,* 77 Ct. Cl. 347 (1933), *app. dism.,* 292 U.S. 606; *Sioux Tribe* v. *United States,* 500 F.2d 458 (Ct. Cl. 1974).

[14] 270 U.S. at 58. The majority opinion in *Choctaw, supra,* 397 U.S. at 634, stated that the Court in *Holt* examined the circumstances of the creation of the reservation and concluded that no disposal of lands to the tribe took place. And in concurring, Justice Douglas distinguished *Holt State Bank* on the grounds that it only involved aboriginal title of use and occupancy. 397 U.S. at 639.

There are other factors that distinguish *Holt.* For example, a specific metes and bounds description for the Red Lake Band was not provided until 1863, 13 Stat. 667, after Minnesota was admitted to the Union in 1858, 11 Stat. 285. Not only that, but the Minnesota Enabling Act did not provide any disclaimer provisions.

nized in 1851 as belonging to the Tribe. A portion of the speech given by Commissioner Taylor to the Crow representatives on November 12, 1867, at the beginning of the negotiations for the Treaty, is particularly instructive:

> "We learn that valuable mines have been discovered in your country which in some instances are taken possession of by the whites. We learn that roads are laid out and travelled through your lands, that settlements have been made upon your lands, that your game is being driven away and is fast disappearing. We know also that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands. Under the circumstances we are sent by the great Father and the Great Council in Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties.
>
> "We desire to *set apart a tract of your country as a home for yourselves and children forever*, upon which your great Father will not permit the white man to trespass. *We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest*, leaving to you however, the right to hunt upon it all as long as the game lasts." (Emphasis added) Proceedings of the Great Peace Commissions of 1867-1868 (1975), Appendix A below, pp. A1-A2.

In response, Blackfoot, one of the principal representatives for the Crow Tribe, spoke:

> "The Crows used to own all this Country including all the rivers of the West." Appendix A below, p. A5.
>
> "We are not very numerous, but are very strong and powerful. There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of

> beaver in all the streams. There is plenty of fish too. I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming." *Id.* p. A11.

The conclusion is inescapable that the United States intended to recognize full title to the property within the metes and bounds description in the Crows, and the Crows understood this. It is also clear from the above remarks of Blackfoot that the Crows expected to continue hunting, but eventually to take up farming. He clearly expressed the availability of fish and beavers within those area designated to the Crow, as a continued source for food, so long as it lasted.

The actual language of the Treaty bears out the assurance given by Commissioner Taylor that the lands will be:

> "[S]et apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . ." Article II, Pet. App. 89.

Thus, the negotiations leading to this Treaty as well as its express language considered against the background of the Fort Laramie Treaty of 1851 reaffirms the intent of the United States to grant these lands including the beds of the Big Horn River to the Crow Tribe.

In addition, it is helpful to examine further documents that occurred after the signing of the treaty. In a letter dated May 20, 1868, to O. H. Browning, Secretary of the Interior, from the President pro tem of the Indian

Peace Commission, John Sanborn (who negotiated the Treaty of 1868 with the Crow), Mr. Sanborn stresses that the main purpose of the treaty was to establish peace and attempt to civilize the tribes and that these goals superseded the consideration of what property was actually being given up by the Indians:

> "But, if the value of the possessions ceded is to be considered, then, for stronger reasons, the government should not hesitate to have the treaties ratified and executed: mineral lands of exhaustless wealth and inconceivable value, extending over thousands of square miles, navigable streams, rivers of hundreds of miles in extent, on the banks of some of which, (the Muscle Shell), our capitalists have already invested more than a million dollars in mines of copper, that promise to exceed in richness any that have ever before been discovered; large agricultural tracts, the finest on the eastern slopes of the mountains, are a portion of what these tribes have ceded by this treaty." Appendix B below, p. B2.

The writer of this letter in describing the land not included in the treaty emphasized the extent of the acreage to which all claim was relinquished. It is noteworthy that the writer specifically describes navigable streams and rivers outside the boundaries as being ceded. This lends strong support to the principle that the rivers and title to the beds beneath them within the area reserved, including the Big Horn River, were not granted away by the tribes but rather reserved by them. *Winans*, *supra*, 198 U.S. at 381.

3. *The 1873 Unratified Agreement*

In 1873, five years after the 1868 cession, the United States negotiated another cession from the Crows. A transcript of minutes of the Agreement of August 16,

1873, appears in the record.[15] Although the 1873 Agreement was never ratified by Congress,[16] nevertheless some portions of the negotiations reveal the thinking of the parties in 1873, and by inference, their thinking in 1868.

The 1873 negotiations came about because the United States wished to obtain a cession of a part of the Crows' 1868 territory which had been (illegally) occupied by miners and prospectors.[17] One theme that appears throughout the 1873 negotiations is that the United States recognized that the Crows' 1868 territory belonged to them absolutely.[18] Another theme was that the Indians were concerned about hunting game, and that the game was diminishing.[19] Congress instructed the U.S. negotiators to try to arrange for a diminished reservation for the Crows,

> "and if there is upon said reservation a locality where fishing could be valuable to the Indians, to

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[15] The Agreement appears at J. App. II, 111-115, see also 4 Kappler 1142; certain related documents appear at J. App. II, 96-111; the minutes appear at J. App. II, 121-128, and J. App. II, 129-185.

[16] See 4 Kapp. 1142; Royce, *Indian Land Cessions* 864 (1900).

[17] J. App. II, 99, 100, 108, 131.

[18] U.S. Commissioner Brunot: "That [the 1868 reservation] is the country that belongs to you forever, or until you wish to sell it." J. App. III, 131, see also 139, 141, 145, 151, 165, 166.

[19] Indian leader Blackfoot: "On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tailed deer; and white-tail deer are plenty, at the foot of the mountain. All the streams are full of beaver. In the Yellowstone River the whites catch trout; there are plenty of them." J. App. III, 137. U.S. negotiator Brunot: "The buffalo used to be on the Platte, as they are now on the Big Horn and Powder River. . . . Buffalo are the Indians' bread, but they are going away, and soon will be all gone . . . ." *Id.* 149.

include the same if practicable . . . ." J. App. III, 175.

Understandably, nothing was said about streambeds, but the tenor of the dialogue suggests that both sides would have been astonished to hear it suggested that the beds within the 1868 reservation did not belong to the Indians in the same sense as the rest of the land. When the treaty negotiations opened with the Crow on August 11, 1873, Mr. Brunot, the principal negotiator for the government, described the land the Crow received as a result of the 1868 Treaty.

> "That treaty says where the Crow land is to be. I think it is a good country. It is along this river [Yellowstone] about seventy-five miles above the agency, and then goes toward where the sun rises *until it crosses the Big Horn*, and goes halfway between it and the mouth of the Rose-bud River, about twelve miles this side of Porcupine Creek. This is what the treaty and the map say. That is the country that belongs to you forever, or until you wish to sell it." J. App. III, 131 (emphasis added).

In the response Blackfoot, the principal speaker for the Crow, said:

> "The Great Spirit made these mountains and rivers for us, and all this land." *Id.* at 136.
>
> Brunot: "It is your land; you can do as you please with it." *Id.* at 141.
>
> Brunot: "You have this reservation . . . . It belongs to you, and you can do as you please about it." *Id.* at 165.
>
> Blackfoot: *"On the other side of the river all those streams belong to the Crows."* *Id.* at 171 (emphasis added).

There is no question but that Blackfoot and the Crows understood that the country described by the 1868 Treaty was recognized as theirs and that it included everything within the boundaries stated—the rivers, the mountains, the streams, and their banks and beds. The United States representatives understood the same. There was a tacit meeting of the minds.

C. Subsequent Legislation Confirmed in the Tribe Its Title to the Bed of the Big Horn River

Initially, it should be stated that in the Fort Laramie Treaty of 1868, the boundary is described as passing up the mid-channels of a river such as "thence north along said 107th meridian to the mid-channel of the Yellowstone River," 15 Stat. 649, Article II, Pet. App. 89. While the Petitioners and their amici make attempts to disregard this particular reference, the implications present from the description with regard to the ownership of riverbeds is unavoidable. This method of describing the mid-channel of the river as a boundary continues through the ceding of lands of the reservation in the Act of April 11, 1882, J. App. II, 44; the grant of a right-of-way to the Northern Pacific on July 10, 1882, 22 Stat. 157; and the ceding of reservation lands in the Act of March 3, 1891, 26 Stat. 989, 1040. Particularly noteworthy is the 1891 Act, which ceded an area of land which lies in part beyond the midline of the Big Horn River. This description reads in part:

> "Then due south and up the north slope of said Prior Mountain on a true meridian line to a point fifteen miles due north from the established line between Montana and Wyoming; thence in a due easterly course on a parallel of latitude to a point whence it intersects the mid-channel of the Big Horn River, thence following *up the mid-channel of said river* to a point where it crosses the Montana and Wyoming state line." (Emphasis added)

The *Choctaw* case regards such a boundary designation running through the midline of the channel of the river in question as a clear indication that the Congress intended to convey a part of the riverbed (on the other side of the channel midline) but to retain the remainder of the riverbed within the reservation. *Choctaw Nation*, 397 U.S. at 633. It certainly seems beyond doubt that Congress intended to include the bed of the Big Horn River within the Reservation because it expressly carried the edge of the Reservation to the midline of the bed of the Big Horn River in the Act of March 3, 1891. Certainly the language in Article II of the 1868 Treaty describing the Crow boundary up to the mid-channel of the Yellowstone is direct proof that Congress intended to grant the bed of the Yellowstone to the Tribe out to the mid-channel there, and indirect proof that Congress intended to grant the full extent of the bed to the Tribe in locations where the stream lay (as in the case of the Big Horn) entirely within the reservation boundaries.

Also, it is not without significance that after the Tribe's title was recognized in 1851, the Organic Act for the Territory of Montana (1864) disclaimed any territory belonging to an Indian tribe in the following language:

> "Provided further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by treaty between the United States and such Indians . . . ." Act of May 26, 1864, 13 Stat. 85, J. App. II, 30-31.

Similar language disclaiming right and title to Indian lands was present in the Montana Enabling Act, Act of February 22, 1889, 25 Stat. 676: [20]

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[20] Besides Montana, the states of Washington, North Dakota and South Dakota were allowed entry into the Union. Identical language may also be found in the Enabling Acts covering Utah, 28 Stat. 107, 108; Oklahoma, 34 Stat. 267; New Mexico and Arizona, 36 Stat. 557.

> "The people inhabiting said proposed states do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by an Indian or Indian tribes." [21]

Thus the impact of this subsequent legislation would be to confirm title of the riverbed of the Big Horn River in the Crow Tribe. Notwithstanding, Petitioners in their brief, pp. 25-27, and Amicus State of Washington, contend that the Crow Allotment Act of 1920, 41 Stat. 751, confirms Montana's ownership to the riverbed by allowing non-Indian ownership of trust land. In support of this argument, Amicus cite no legal authority other than a footnote in the decision by this Court in *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165, 174 n.12 (1977). There this Court took the position that in view of the fact that only 22 acres of the Puyallup Reservation were still retained in trust ownership and that none of this acreage abutted the river, an argument that the riverbed was in trust status would be at odds with the uncontradicted findings of the court below.

Initially, it must be emphasized that the issue of the ownership of the riverbed of the Puyallup River was not before the Court. Also, in view of the above arguments concerning the intent of Congress and the exhaustive analysis which this Court itself has applied to the question of whether a treaty or statute has granted or recognized title to Indian land, it is without foundation to suggest that this footnote disposes of the issue in this case. Indeed in footnote 11 of the same opinion, 433 U.S. at 173, there is a question raised as to the continued existence of the Puyallup Reservation. However, this reference also lacks any detailed analysis of the statutes in question which would show how title was divested.

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[21] Also, the proceedings of the Constitutional Convention for Montana in 1880 contain many references disclaiming title to Indian lands. See Crow Tribe Exhibit 11, J. App. II, 49-54.

In the present case the Crow Reservation is indisputably in existence. Furthermore, the sale of reservation land to non-Indians is completely consistent with continued reservation status. *Mattz* v. *Arnett*, 412 U.S. 481, 497 (1973). This is especially true as to sales by individual Indians, as here, as opposed to sales directly under a congressionally approved program, as in *Mattz*.

An examination of the Crow Allotment Act does not bear out Petitioners' contentions. In fact, Section 10 of that Act, Pet. App. 105, 112, leads to a contrary conclusion. There it is stated:

> "That any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved from allotment or other disposition hereunder, for the benefit of the Crow Tribe of Indians."

There is no doubt that the riverbed of the Big Horn River falls within the above definition. Certain lands underlying the Big Horn River have already been condemned for use in a dam project. In the litigation awarding compensation for the taking, the District Court concluded that compensation should be given for water power value pursuant to the meaning of the above section of the 1920 Act. *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108 (D. Mont. 1958).

The remaining portion of the riverbed in question in this suit certainly has water power potential. As recently as July 9, 1980, the United States Department of Energy awarded a grant to the Crow Indian Tribe to study the feasibility of a synthetic fuels plan which would utilize water from the Big Horn River in conjunction with the development of the Tribe's resources. Therefore, under this section above, it is clear that the riverbed would remain unallotted. Thus, this contention by the Petitioners must fail.

D. Summary and Analysis

Following the *Choctaw* analysis (page 14 above), it would seem difficult to conclude that the United States intended to withhold recognition of the streambeds within the Crows' unceded reservation, so as in effect to reserve them for whatever future state was organized there. With respect to the 1851 Treaty:

1. As in *Choctaw*, the tract recognized as the Crows' surrounded the Big Horn River (and other streams) on both sides.

2. The Crows had owned this land since before the white man came. The Choctaws, on the other hand, had not previously owned the land in question.

3. As in *Choctaw*, there was no explicit exclusion of the bed in the treaty.

4. As in *Choctaw*, the treaty was for the benefit of the United States, not the Crows.

5. Treaties are to be construed as the Indians would have understood them.

The 1868 Treaty made the Crows' claim to the streambeds even stronger. The following factors were added to the foregoing ones:

6. The Crows were promised that no whites would be allowed in the new, diminished reservation, and it was implied that the Tribe would have self-government undisturbed by any future state. This is comparable to the promise to the Choctaws that their new land would never be within any state.

7. When Montana became a Territory in 1864, Congress provided that nothing in the Territorial Act would impair any Indian rights "so long as

such rights shall remain unextinguished by treaty . . . ." The Crow title to the streambeds in the 1851 Reservation was not extinguished by treaty by 1864.

8. When Montana became a state in 1889, it was required to disclaim all right and title to lands owned by Indians "until the title thereto shall have been extinguished . . ." The Crow title to the streambeds in its present Reservation has never been extinguished.

9. One of the calls of the 1868 Treaty was "down the middle of the Yellowstone," showing intent that the near half of the river remain within the Reservation.

In the face of these factors it cannot fairly be concluded that the Crows do not own the streambeds within their present reservation.[22]

II. THE CROW TRIBE OWNS THE STREAMBED TO THE HIGH WATER MARK

The State argues (Pet. Br. 27-29) that the riparian owners on the Reservation own the upland down to low water mark, because that is the Montana rule when the stream is navigable. The court below rejected this on

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[22] Apparently the Montana Supreme Court would agree. See *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629, 635 (1954), where it held that the Flathead reservation lands "were not held by the United States for the state [of Montana] upon its admission. Compare: United States v. Stotts, D.C., 49 F.2d 619. . . ." The *Stotts* case, see note 7 above, held that the Lummi Tribe owned tidelands adjacent to its reservation despite the usual rule that the U.S. holds tidelands for the future state.

Even the trial court below agreed initially. On Sept. 4, 1974, after briefing, the trial court held: "Considering *Choctaw Nation*, the treaties involved in this case, and the nature of the Crow Tribe's title, the conclusion is inescapable that the river bed of the portion of the Big Horn River in question belongs to the Crow Tribe."

the grounds that the federal rule should apply, not the state rule. Pet. App. 24-26.

It seems to us that the answer depends entirely on whether the Tribe owns the streambed, for if it does, then it owns up to high water, because it still owns all but what was allotted, and the allotments only went down to the high water mark.[23] Obviously, if the Tribe owns the banks, then they cannot pass by state law to the non-Indian who buys a riparian allotment.

If on the other hand the State owns the streambed, as it claims under the equal footing doctrine, then likewise *it* owns to the high water mark, and can by operation of state law convey the bank to the non-Indian who buys a riparian allotment.

III. THE CROW TRIBE MAY REGULATE HUNTING WITHIN THE BOUNDARIES OF THE CROW RESERVATION

If the Court concludes that the Tribe owns the bed of the Big Horn River, the question of power to regulate or prohibit fishing (and bird hunting over the river) is disposed of. Obviously, the Tribe, as owner of the streambed, can prohibit outsiders from hunting or fishing on tribal land, or can allow it on such terms as the Tribe pleases. *United States* v. *Pollmann*, 364 F. Supp. 995 (D. Mont. 1973); see *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918).

However, this still leaves open the question whether the Tribe may prohibit or regulate hunting on non-Indian land within the reservation. We submit that as to this question (and as to fishing also if the Tribe does

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[23] *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894). The tribe owned to high water mark in *Donnelly* v. *United States*, *supra*, 228 U.S. at 252; see also *Montana Power Co.* v. *Rochester*, 127 F.2d 189, 191 (9th Cir. 1942).

not own the Big Horn bed), the Tribe has an exclusive right, in the nature of a profit a prendre, to hunt (and fish) throughout the reservation, regardless of whether the locus is on trust or fee land. As owner of this exclusive right, it may prohibit anyone from sharing in the right, or may permit it on such terms as it pleases. This argument is presented in Section A below.

But if this Court should conclude that the Tribe does not own the exclusive right to hunt (and fish) on the reservation, then the Court will reach our alternative argument, which is that the Tribe has the sovereign power to regulate hunting (and fishing) anywhere within the reservation, and may for the sake of conservation entirely prohibit hunting (or fishing), at least by persons who do not live on the reservation. This argument is presented in Section B below.

A. Hunting or Fishing Anywhere Within the Reservation Without Tribal Permission is an Infringement of the Tribe's Exclusive Right to Hunt and Fish

At the time of the making of the Fort Laramie treaties of 1851 and 1868, the U.S. knew that hunting and fishing were relied upon by the Crow Indians as a means of sustenance. Pet. App. 32, and see p. 20 above. The 1851 Treaty expressly guaranteed the Tribe's right to hunt and fish anywhere within the entire Fort Laramie territory.[24]

During the negotiations leading to the 1868 Treaty of Fort Laramie, Blackfoot, one of the chief spokesmen for

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[24] Pet. App. 86 (the signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described"). See *Mescalero Apache Tribe* v. *New Mexico*, —— F.2d —— (10th Cir. Aug. 13, 1980) ("The Tribe's inherent authority [to regulate fish and game] stems largely from the traditional reliance on wild game for basic survival needs." Slip Opn. 10.)

the Crows, spoke of the Tribe's intention to rely for its livelihood on the fish and game in Crow Country:

> "We are not very numerous or very strong and powerful. There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish, too. I never yet heard of any of the Crow nation dying of starvation. I know that the game is fast decreasing and whenever it gets scarce I will tell my Great Father. That will be time enough to go farming. . . ." [25]

Article II of the Fort Laramie Treaty of 1868, Pet. App. 88-89, set aside the property described in the Treaty for the "absolute and undisturbed use and occupation of the Indian." It also provided that no persons other than those authorized by the Crow Tribe and with certain other exceptions not relevant here "shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians." Article IV of the Treaty, Pet. App. 90, provided that the Crows would make the reservation their permanent home and would not make a settlement elsewhere.

These circumstances, we submit, create in the Tribe an exclusive right to take game on the reservation, a right that exists throughout the reservation separate and apart from the ownership of the underlying land; and while this right may be diluted to the extent that one who lives on reservation fee land may also hunt on it (as the court below held and the Tribe does not question

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[25] Appendix A below, p. A-11. This concept was expressed throughout the negotiations held in 1873 between the Government and the Crow Tribe. Crow Tribal Exhibit 74, J. App. II, 93-128, and III, 129-185, also 136-137, 149-154. The preservation of game and fish for the sustenance of the Tribe has been expressed over the years since the time of the treaty. See Pl. Exs. 6, 18, C.T. Ex. 71-g.

here), it may not be diluted to the extent of permitting nonresidents to come on the reservation to hunt.

In *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954), a Flathead Indian killed an antelope out of season on fee land on the reservation, and the State convicted him of violating the State season law. In voiding the conviction the Montana Supreme Court had this to say:

> "The exclusive right to hunt and fish, under the treaty, on all of the lands within the exterior boundaries of the Flathead Indian Reservation was not granted by the United States but was reserved by the Indians. It is a right held in common by each Indian of the tribes signatory to the agreement. *This right is a servitude and easement, an interest in the land, which the Indians have never alienated and which interest and right the United States or the state never owned or acquired and therefore could not convey. No patent issued by the government, either federal or state, conveyed this right and interest.*
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> * * * *
>
> "The exclusive right, acknowledged by the treaty, of hunting and fishing in and upon the lands and waters within the exterior boundaries of the Flathead Indian Reservation, imposed a servitude and easement upon every piece of land therein as though specifically described. The future ownership of the lands thereof was well foreseen and provided for.
>
> "The Indians retained a right in the land, the right of hunting thereon. *The right was intended to be a continuing one against the United States and its grantees as well as against the state and its grantees.* No other conclusion would give effect to the treaty. Compare United States v. Winans, supra. It is our opinion that *the rights reserved of hunting and fishing upon any and all lands and waters within the exterior boundaries of the Flathead Indian Reservation, by the treaty of July 16, 1855, 12 Stat.*

> *975*, have never been alienated, still exist unimpaired and that as far as the state laws are concerned, the Indian tribes bound by the treaty are entitled to hunt and fish therein at any time." 268 P.2d at 635 (emphasis added).

That the Tribe may own the right even though its land has been conveyed to non-Indians is shown by the off-reservation hunting and fishing rights cases, see especially *United States* v. *Winans*, 198 U.S. 371 (1905). To be sure, the Indians' right there was not exclusive, but it was sufficient to cause the landowner to restrict his fishing. See also *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (Indians entitled to 50% share, and non-Indians must limit their fishing to permit the Indians to take their share).

Even the termination of a reservation does not terminate the implied hunting and fishing rights that arose within the reservation when it was created. See *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. den.*, 419 U.S. 1019.

We believe the correct concept was expressed by *Mason* v. *Sams*, 5 F.2d 255, 258 (W.D. Wash. 1925):

> "There is no analogy in this matter between the power of the government, and the authority of the state over the fish in its streams. The state owns the fish and the game of the state, and may regulate or license the right to take them, or forbid it entirely. *But the fish in the waters of this stream do not belong to the state, nor to the United States; but to the Indians of this reservation.*" (Emphasis added).

The exclusive right is owned by the Tribe, not by its members,[26] and therefore cannot be alienated by the members.

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[26] "Whatever title [to tribal property] the Indians have is . . . held by the tribe for the common use and equal benefit of all the

B. The Crow Tribe Has Civil Jurisdiction to Regulate Hunting and Fishing by Non-Indians Anywhere Within the Reservation

That non-Indians on the reservation are subject to tribal hunting and fishing regulations, at least where the status of the land was Indian-owned, or was not in issue, has been seen in many cases.[27] The instant case is the first to involve the question whether tribal hunting and fishing regulations specifically apply to fee land on the reservation.

The Petitioners take the position that the Crow Tribe does not have inherent sovereignty to regulate hunting activity on non-Indian fee lands. Pet. Br. 34. While the decision in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), makes clear that tribes do not have *criminal* jurisdiction over non-Indians,[28] it has been consistently recognized that tribes have at least some *civil* jurisdiction over non-Indians on the reservation.

In *Worcester* v. *Georgia*, 31 U.S. 515, 559 (1832), Chief Justice Marshall stated:

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members." *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902); see also *Whitefoot* v. *United States*, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (fishing rights owned by tribe, not members); Hobbs, *Indian Hunting & Fishing Rights*, 32 Geo.Wash. L.Rev. 504, 515-16 (1964).

[27] See, e.g., *Quechan Tribe* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976); *United States* v. *Pollman*, 364 F. Supp. 995 (D. Mont. 1973). See also *Mescalero Apache Tribe* v. *New Mexico*, —— F.2d —— (10th Cir. Aug. 13, 1980); *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Comm.*, 588 F.2d 75 (4th Cir. 1978), pet. cert. dism. by stipulation, —— U.S. —— (May 22, 1980).

[28] However, a tribe may have authority to arrest a non-Indian for violation of federal or state law, and promptly turn him over to the federal or state authorities. See *Ortiz-Barraza* v. *United States*, 512 F.2d 1176 (9th Cir. 1975), and *Quechan Tribe* v. *Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

> "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power . . . ." *Id.* at 559.

And, Indian tribes are—

> ". . . distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ." *Id.* at 557.

In his authoritative *Handbook of Federal Indian Law*, Felix Cohen summarized the judicially recognized background:

> "The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government." [29]

A necessary part of (in Cohen's words) the "full powers of internal sovereignty" is the power to regulate everyone within the reservation, Indians and non-Indians alike, within the limits imposed by Congress. In 1934 the Solicitor of the Interior Department declared: [30]

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[29] Cohen, *Handbook of Federal Indian Law*, (G.P.O. 1942) at 123 (hereinafter *Cohen*). Also quoted in Department of the Interior, *Federal Indian Law* (1958) at 398.

[30] *Powers of Indian Tribes*, 55 I.D. 14 (1934). Excerpts from it appear in *Cohen*, at 122.

> ". . . [O]*ver all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders,* the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority." 55 I.D. at 50 (emphasis added).

In 1976, the Associate Solicitor for Indian Affairs (the top attorney for Indian matters in the Interior Department) clarified the position of the Department and left no doubt that the position of the government was that the Tribe had regulatory authority over non-Indian hunting and fishing on the reservation. J. App. II, 3-8. The same year, the Solicitor of the Interior Department issued a detailed, unpublished opinion, dated Oct. 13, 1976 (which the Confederated Colville Tribes et al., as amici curiae, have lodged with the Clerk of this Court), concluding that the Shoshone-Bannock Tribe can zone fee land on its reservation. The recent *Knight* case has agreed, see note 32 below.

These authoritative rulings by the federal agency responsible for supervision of Indian affairs directly refute the Petitioners' argument that purchase of fee land takes that land out of the Tribe's power to control hunting and fishing.

Similarly, the Attorney General of the United States has ruled that:

> "[T]he legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation . . . . [T]hese nations [are fully authorized] to absolutely exclude outsiders or to permit their residence or business upon such terms as they may choose to impose. . . ." 23 Ops. Atty. Gen. 214, 217 (1900).

In *Quechan Tribe* v. *Rowe*, 531 F.2d 408, 411 (9th Cir. 1976), the court held:

> ". . . [T]he Quechan Tribe may exercise several types of authority over non-members who enter the reservation to hunt or fish. These are: the rights to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation without proper authority or those who violate tribal, state or federal laws; to refer those who violate state or federal laws to state or federal officials; and to designate officials responsible for effectuating the foregoing." [31]

In *Williams* v. *Lee*, 358 U.S. 217 (1959), the Court considered the question whether a non-Indian could sue an Indian in state court on a debt arising on the reservation. This Court said no:

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. . . ." 358 U.S. at 220.

This Court concluded:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence *would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.*" *Id.* at 223 (emphasis added).

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[31] The court might have added another remedy: to seek injunction or damages in federal or state court. This Court is well aware of the enforcement of Indian fishing rights through comprehensive court orders seen in *Washington* v. *Fishing Vessel Assn.*, 443 U.S. 658, 673 (1979). Yet another device, sometimes used, is cross-deputization of tribal officers so that they can enforce federal or state criminal law.

In *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164 (1973), this Court clarified the proper application of the *Williams* infringement test:

> "It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdiction. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." 411 U.S. at 179.

In the case at bar, the Court (if it rules against the Tribe on the streambed and exclusivity points) faces the problem that the *Williams* test was designed to resolve: if the Crow Tribe, acting through its elected governing body, desires to prohibit all hunting and fishing on the reservation, it would be a gross infringement of tribal self-government for the State to permit non-Indians to ignore the tribal prohibition. Therefore, under *Williams*, the tribal prohibition takes precedence.

This Court in *Oliphant* questioned none of these authorities; it referred only to a tribe's *criminal* power over non-Indians. The significance of *Oliphant* is that while a tribe may lose sovereign power by express abrogation by treaty or Congressional enactment, it may also lose some sovereign power by the mere act of becoming dependent on the federal government. However, this is not a total loss of sovereignty; the *Oliphant* Court said:

> "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government." 435 U.S. at 208.

Indeed this principle of retained sovereignty was more clearly recognized in *United States* v. *Wheeler*, 435 U.S. 313 (1978). In that case, this Court discussed a tribe's sovereignty over its own members.

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' *United States* v. *Kagama* [118 U.S. 375, 381 (1886)]. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.
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> "*But our cases recognize that the Indian tribes have not given up their full sovereignty.* We have recently said 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [They] are a good deal more than "private voluntary organizations."' " [32]

Furthermore, the concept of tribal sovereignty espoused in *Wheeler* was reaffirmed in *Washington* v. *Confederated Colville Tribes*, 48 U.S.L.W. 4668 (June 10, 1980), where the Court upheld a tribal cigarette tax on non-Indians:

> "The widely held understanding within the Federal Government has always been that federal law to date has not worked a divestiture of Indian taxing power. Executive Branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which

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[32] 435 U.S. at 323, emphasis added. This Court cited *United States* v. *Mazurie*, 419 U.S. 544 (1975), where this Court affirmed a tribe's authority to regulate a commercial liquor enterprise operated by non-Indians and located on fee land within the boundaries of the Wind River Reservation. See also *White Mountain Apache Tribe* v. *Bracker*, 48 U.S.L.W. 4897, 4899 (June 27, 1980).

A recent case, also arising on the Wind River Reservation, has held in a carefully reasoned opinion that the Tribe has the inherent power to zone non-Indian fee land in a predominantly Indian community on the reservation. *Shoshone and Arapahoe Tribes* v. *Knight*, —— F.Supp. —— (D. Wyo. June 27, 1980).

the tribes have a significant interest. 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855), including jurisdiction to tax. 23 Op. Atty. Gen. 214 (1900); *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934).

"Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity. *Buster* v. *Wright*, 135 F. 947, 950 (CA8 1905), *appeal dismissed*, 203 U.S. 599 (1906); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (CA8 1956); cf. *Morris* v. *Hitchcock*, 194 U.S. 384, 393 (1904). No federal statute cited to us shows any congressional departure from this view. To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476. In these respects the present cases differ sharply from *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians.

"Tribal powers are not implicitly divested by virture of the Tribe's dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government as when the Tribe seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. See *id.*, at 208-210; *United States* v. *Wheeler*, *supra*, at 326. In the present case, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by the tribal

> taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on and subordinate to only the Federal Government, not the States." [33]

As the above words imply, inherent sovereignty to regulate must extend to the activities of the non-member within the reservation boundaries. This certainly appears to be the implication of *Colville* where this Court recognized inherent sovereignty and said that it could be divested only when found to be inconsistent with the overriding interests of the National Government.

Such is certainly not the case here where the Tribe, for conservation purposes, attempts to bar non-residents from hunting and fishing on the reservation. The treaty right to hunt and fish, based on an express provision in a treaty (the 1851 Treaty), and accompanied by the understanding that the tract of land set forth in the treaty contained game and fish for the sustenance of the Indians, cannot be given a meaning that would render this right meaningless. Thus, the opinion below which allows tribal regulation to prohibit hunting and fishing within the bounds of the reservation to all but residents, is a proper balancing of treaty provisions made long ago with present day circumstances. There is no federal policy or statute that conflicts with this procedure and thus under the rule espoused by *Wheeler* and *Colville*, the Tribe would have the inherent authority to prohibit non-residents from hunting and fishing on the reservation.

Another reason for finding tribal jurisdiction is the "checkerboard" problem. The Tribe, as the local government of the Reservation, should have regulatory power over *all* land within the Reservation, including fee land. If tribal officers must "search tract books" to determine whether they have jurisdiction to enforce conservation

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[33] See also *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), upholding a tribal tax on non-Indian oil producers.

laws against non-Indians, enforcement will suffer. See *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (1976). The definition of "Indian country" in 18 U.S.C. § 1151 should be used to define the territorial jurisdiction of the Tribe.

> "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n. 2 (1975).

The *Knight* case, note 32 above, followed this principle in holding that the tribe had jurisdiction to zone fee land.

A very recent case, *Mescalero Apache Tribe* v. *New Mexico*, —— F.2d —— (10th Cir. Aug. 13, 1980), has held that "In regulating game on the reservation, the Tribe thus seeks to exercise its sovereign power in an area in which it unquestionably has a 'significant interest,' " citing the *Colville* case, *supra*. The court also was influenced by Public Law 280, 25 U.S.C. § 1321(b), which protects tribes subject to P.L. 280 from the deprivation of "any right . . . afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

IV. CROW TRIBAL RESOLUTION 74-05 NEITHER DEPRIVES NON-INDIANS OF FIFTH AMENDMENT GUARANTEES NOR DOES IT VIOLATE THE INDIAN CIVIL RIGHTS ACT

Neither the State nor its citizens have any claim that they have been denied equal footing protection or due process. The citizens of the State have no right to share the benefits of tribal fishing rights, unless the Tribe elects to grant permission to do so. The first opinion of the court below so holds. Pet. App. 81-82.[34]

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[34] In any case, the issue was disposed of by this Court in *Washington* v. *Fishing Vessel Assn.*, 443 U.S. 658, 673 n. 20 (1979).

V. THE COURT BELOW DID NOT ACT CONTRARY TO F.R.CIV.P. 52(a) IN REVIEWING THE DISTRICT COURT'S FINDINGS

Petitioners (Pet. Br. 41-42) do not indicate which findings of the trial court were set aside by the court below. Presumably (in view of the great attention it gave the matter at trial) Petitioners have reference to the trial court's finding that the Crow Tribe was largely dependent upon big game animals or agriculture for subsistence; and that fish was not a central part of the Crow diet. Pet. App. 32. But the Tribe does not contest these findings, and the appellate court did not say anything inconsistent with them.[35] Petitioners perhaps believe the Tribe must prove it subsisted mostly on fish in order to have fishing rights on its reservation. This is not the law.

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[35] The appellate court said, consistent with the trial court's findings, "At the time of the treaties the Crows were primarily hunters of buffalo and elk . . . ." Pet. App. 11.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

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September 26, 1980

Appendices

APPENDIX A

PROCEEDINGS OF THE COUNCIL WITH THE CROW INDIANS *

Fort Laramie, Dakotah Territory
November 12th, 1867

At ten o'clock a.m. on Tuesday, the 12th inst, the Commission met the Crows in Council, the proceedings of which were opened by Commissioner Taylor as follows:

COMMISSIONER TAYLOR

My friends! Chiefs, Headmen and Warriors of the Crow Nation. Of one blood the great Spirit made all people. We are therefore brethren. At our invitation you have come a long way, through much difficulty, to meet us. We have travelled a great distance to see you and to take you by the hand as friends and brothers. Your great Father at Washington, though so far away from you, is well informed of your friendship towards us. He knows also of the many proofs of faithfulness you have given to the government in past times. He knows also of some of the difficulties and troubles that surround you. He has sent us to see you in order that he may learn more fully, from your own lips, your true situation, and that he may take all necessary steps to remove those difficulties, and to make your way smooth for the future.

We learn that valuable mines have been discovered in your country which in some instances are taken possession of by the whites. We learn that roads are laid out and travelled through your land, that settlements

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* Published by Institute for Development of Indian Law, Wash. D.C., 1975, pp. 86-91.

have been made upon your lands, that your game is being driven away and is fast disappearing. We know also that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands. Under these circumstances we are sent by the great Father and the Great Council in Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties.

We desire to set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass. We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, leaving to you however, the right to hunt upon it as long as the game lasts. Upon the reservations you select, we propose to build a house for your agent to live on, to build a mill to saw your timber, and a mill to grind your wheat and corn, when you raise any; a blacksmith shop and a house for your farmer, and such other buildings as may be necessary. We also propose to furnish to you homes and cattle, to enable you to begin to raise a supply or stock with which to support your families when the game was disappeared. We desire also to supply you with clothing to make you comfortable and all necessary farming implements so that you can make your living by farming. We will send you teachers for your children. Our hearts are glad to see you and you shall not leave us empty handed. There are presents for you on the road which we expect here every day. They ought to be here now. We will show our friendship by our acts. We wish to hear from you everything you have to say. We will consider it well and answer you in a friendly spirit.

A-3

BEAR'S TOOTH

I have come a long way to see you. I am very poor. My horses are all tired. In coming it was very cold. We had no wood to make any fires. (Turning to General Harney.) *You are now getting old. The weather is cold, so I will give you my robe, and place it on your shoulders.*

Last spring, I came to the Garrison on the Big Horn. They told me that the Great Father was calling for me. Our agent talked to me about coming here. I told him if my great Father would meet me at Phil Kearney, I would listen to him and agree to all he said. I was on the Yellowstone when the leaves were falling from the trees. Your messenger brought me ten plugs of tobacco from you. He told me that the Commission was not coming to Fort Phil Kearney and he told us to come here. Since I have come here I want you to do what I ask you. There is no wood, water, or buffalo this side of Phil Kearney. I was very hungry on the way. I have been waiting for you here a long while.

Look at me right. I am a person like you and have the same limbs and blood. I wish to live a long time and I want you to prosper us. I have plenty of children and I want them to live a long time. Your young men scare away the game and I have none left. I came to see you on this account. I want you to take pity on me and call back your young men from the country of the Big Horn. Your young men have destroyed the young grass and have set the country on fire. They kill the game, not because they want it. They leave it to rot on the roadside. Suppose I were to go into your country and destroy your cattle? But no, I would not do so. I have a good strong heart. The Sioux have given me a great many hundreds of horses and mules to join them in fighting you, but I have not done so, and I am still here shaking hands with you.

A long time ago you made a treaty with my nation, the Crows, and took one of us to Washington. He has been gone a long time and has not returned. We now want to get anything which he may have here. We are tired of waiting for him. You called for the Sioux the same as you did for us. You sent them tobacco. You sent them very little. You sent them packhorses. The Sioux told us to come and listen to you and then return and tell them what we had heard. They told us that you were going to fool us and not give us back our country and that you would play us the same trick you did them. They told us that if your words were good they would follow our tracks. In going back to my country, I expect to lose a great many horses. Take pity on me. I am not ashamed to talk to you. I am speaking from a full heart. The great Spirit made us all. We are surrounded by the whites. Take some of your heart and put it in with mine and try to make of me a good man. All my people, for a long time, have been friendly to the whites. Some time ago, a white Chief struck one of my people on the head with a revolver. On the Yellow Stone there were four white people. Four Indians, two of them Chiefs, went over and asked for bread. One of the whites pulled out a revolver and shot two of the Indians. One died. The whites have killed a brother of one of my young men, Wolf Bow, who went and joined the Blackfeet. We went and joined the Blackfeet. We looked over it and have never mentioned it until now.

If I were to kill you, we would all be killed by your people. There was a party of whites encamped near us one night when there was no fire or moon. We thought it was a war party of Sioux so we fired into it. We were sorry when we found it was a white camp. We are bad for doing so, but it was my young men. I went along the Missouri River to try and find some white Chief to whom I could tell of my bad doings in firing into that camp. I went to Fort Benton to beg pardon

of the Commander there, and to give him a great amount of robes and mules and horses for doing that bad act. I paid for my badness. When I found your young men on the Big Horn, I was glad to meet them; so that I could often visit them. They drove me away. I want you to pay me for coming here. You talk about farming for me and raising stock. I don't like to hear that. I was raised on game and I would like to live as I was raised. If I were brought up like you, our arms would be strong, and I would work like you. We want to kill our own game and be glad. All the Crows feel as I do. We want Dr. Matthews to remain as our agent. (Taking off his Moccasins and offering them to Commissioner Taylor.) *I have nothing else to give you. It is cold weather, but take them.*

COMMISSIONER TAYLOR

I accept them as a token of friendship. I will borrow the warmth of your blood to make me warm.

BLACK FOOT

I was raised and born on the dust, but I shake hands with you all. I am glad to see you. I have come a long way. (Presenting a robe to Commissioner Taylor.) *I make you a present of this robe. It is cold. Take it to cover yourself. The Crows used to own all this Country including all the rivers of the West. When I was a boy, we had no iron to make arrow heads, knives, or axes; and we would roam the prairie and pick up old shoulder blades to make all the things we needed. Then we had no white man among us. We would pick up flints to make a fire and to make arrows and knives. My grandmother used to take a tripe and make a kettle out of it to cook in and also to carry water with.*

You speak of putting us on a reservation and teaching us to farm. We were not brought up to that and are not able to do it. That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised. I know the Great Spirit made a man and woman to live together. We were brought up to fight our enemies, and we do so. The Great Spirit made me not to wash my hands in the blood of the whites. I will never kill or scalp a white man. I am talking with a good, honest heart now. I will advise my young men to do nothing bad. I have a clear conscience and am ashamed of nothing. I want my Great Father to love me all the time.

A long time ago a treaty was made with us. Our agent told us the great Father wanted to see us. We had an enemy's country to go through, but we went. We sold them the California road. They were to give us goods for fifty years. One of our men went to the States some sixteen years ago. We want to know where he is, and to get everything he may have. We did not get the goods promised to us for fifty years. We only received them once. (The Indian he speaks of stepped off the Steamboat going down the river when near St. Joseph, and got drowned.)

We have nothing now, not even a knife. We are very poor and keep getting poorer. The great spirit has forgotten me. We are being surrounded by the whites and by other nations. Our country is getting smaller and smaller. The whites have made two branches of a road besides the California and have cut up the best game country we have. I suppose my great Father was brought up to the use of all good things. I was born and raised naked. He has put his heart to mine. I want you to protect me and to let me live as long as yourselves. I love my children and want them to love you strong, and not a little. Do the same by me. You would be mad if

I were to go into your country and kill all your stock. I cannot go anywhere without coming on some of your people. What have we done to be served in that way? I would like to have them called in and the Road stopped. (Meaning the Powder River Road.) *Your people do not make anything by that Road that I can see.*

I am in earnest with you. All the Indians have been trying to make me fight you and join them. Your people going through the Country looking for gold are the ones who cause us much trouble. When I go to any travelling party of your people and ask for food, they strike me on the head with a club and run me off. When our nation was first called to meet the Commission, we wanted to go to Phil Kearney. We were told you could not go there so we agreed to come here. Up to this time we have been told nothing but lies and we hardly believe now. Give us a good agent. Give us a copy of the treaty that you will make with us. Our present agent is a good man and will not fool us. The food of the white man is not good for us. It makes us sick.

A long time ago we were rich in horses. Now we have but few. When we get back to camp, what we have will die. Give me some horses to go to my camp. Last summer a lot of goods were promised me. All I received was damaged flour which killed a good many of us. My father told me a big lie. (Referring to Judge Kinney.) *I think the words of the Great Father will come to me straight now this time, as General Harney is a good man, and I see him here.*

WOLF BOW

None of us ever fought against you. We have never been your enemies. I am speaking and will always speak the truth. You want me to go on a reservation and farm. I do not want to do that. I was not raised so. I was not

raised on hog meat or cattle. I love buffalo meat and want to remain on my own land. Here are my children behind me. There are yours behind you. Call off your young men from the Powder River road and let that road be abandoned. If you do that, I will think you love me. You white people love your own provisions. Don't trouble my country any more with roads but send every thing up by steam boat. Put the Sioux Indians in their own country and keep them from troubling us. Don't stop fighting them.

The Council then adjourned. The Commissioners agreed to meet the Crows at ten o'clock a.m. Wednesday, the 13th inst, for the purpose of making with them a treaty of peace.

Second Day's Proceedings
Fort Laramie, Dakota Territory
Nov. 13th, 1867

The Council was opened by Commissioner Taylor who replied to the speeches of the Crow Chiefs in Council yesterday, as follows:

COMMISSIONER TAYLOR

Chiefs, Headmen, and Warriors of the Crow Nation. On yesterday you met us in Council and spoke freely. We were glad to hear you because you have always been our friends. We have considered what you have said and I now, in the name of the Commission, answer you. A man can well afford to give friendship for friendship. You spoke of several injuries you received at the hands of white people. If you had not been true to us, you might have gone to war with us, but because your hearts were warm, you forgot those injuries. When the Great Father hears of your injuries he will be sorry. He has some bad children who commit those things without his knowledge, but he is always willing to make you amends.

He will be pleased to know, that you did not go to war. We hope you will always act in the same friendly spirit.

When you have any grievance to complain of, always go to your agent. He will inform your Great Father, and he will have you righted. You speak about our people killing game and leaving it to rot. We are sorry to hear that, but we cannot have our children always under control. We will try to prevent it in future. On account of your refusing to join the Sioux against us, when urged to do so, you are dearer to us than ever. We hope when you return to your country that you will inform the Sioux of our promises and that they will be induced to make peace. We will not allow you to come to us at a heavy cost. You say you have lost a good many horses in coming here and will lose more in returning. We will show you that we know how to reward our friends. We will give you horses, if any can be procured here.

Your countryman of whom you spoke yesterday, went to Washington, was well treated and returned as far as the Missouri River. When last seen he was on a steamboat with many presents which the whites had given him. He disappeared without the knowledge of anybody. He must have been murdered by some bad people or have fallen overboard from the steamer. This Commisison did not know anything of it until they arrived here and made some inquiries about him. They propose to give your nation two horses to make you feel glad. You can dispose of them as you see fit. You object to being placed on a reservation and to farming because you were raised wild on the prairie. Formerly you could find all the game you needed but now the buffalo have entirely disappeared from a large portion of your country. The game will soon entirely disappear.

Our people were formerly confined to the eastern country but they are rapidly spreading all over the West. Your great Father looks ahead and wishes to preserve,

for your own use, some of the good lands as a reservation for you and your children forever. He does not wish to force you to settle down immediately, but simply to keep a place for you, free from the intrusion of the white men. You will still be free to hunt as you are now. You ask us to abandon the Powder River road and to withdraw our troops from that line. The great Father has sent us here to examine that matter, and when we sent for you and the other Indians, we expected to council together in reference to it. We are sorry that all who are interested in that road are not here. If they were, we might settle the question at once, but as only a few are here, we can only tell you what to say to the Sioux when you return. We will consider your wishes in that respect.

We will meet you next spring and settle the matter. The season is so far advanced, the distance to your country is so great, and the property is so bulky and heavy, that we could not leave the posts this winter, if we would, without great loss and suffering. If you will stop the war and keep the peace in good faith until we hold our peace Council next year, we may do as you wish us to do about the road and the posts. But if you go to war we can make no promises, but that we will meet war with war. We hold that road to protect our people against bad Indians. If war continues, the road and posts will be held. If we do not abandon the road in the spring, we will pay you for it. The Great Father prefers peace. He loves his red children and does not want them to perish.

BLACK FOOT

What you have told me today is all good. The Sioux are fighting you, what for, I do not know. I went into the Sioux camp on Tongue River to learn why they were fighting. They told me it was on account of the Powder River Road and that as soon as that road was stopped, they would stop fighting. The Man Afraid of his Horses

told me that. All the whites love him. He is my brother-in-law. When I return to my country, I will tell them all what you have said, and they will be glad. We would like to have the troops withdrawn from our country this winter. The Sioux say they cannot come here now but will come in the spring, when the grass grows.

We are not very numerous, but are very strong and powerful. There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish too. I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing, and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming. Your people like to get my country for nothing. That is not right. I want to be paid for it. I believe all you tell me, and whatever you give me, I will be satisfied with. You are speaking of making a treaty now. You have not kept the promises made to us in the last treaty. We have only received goods once, when we ought to have received them every year.

COMMISSIONER TAYLOR

The goods were sent by the Great Father but were stolen by his agents. We will report the matter to him and have you righted.

WOLF BOW

You have tolked good and straight to me today. I am not a fool. I am peaceable and yet you refused me ammunition. The Sioux are trying to get me to join them, but I want to stay with the whites. I do not want my country made the battle ground of the Sioux, as you might think my nation was mixed up with them. If any of your young men want to seek for gold, let them travel on the river. They have good boats. Let those who have no boats travel on the other side of the Missouri where

there is a good trail. I will give you those two trails, one by water, and one by land. I will not give you the Powder River Trail. If you keep on going there, I will get into trouble. There is plenty of gold in our country. I have got some of it. I know where there are plenty of gold mines, but I did not like to tell anybody because there would be so many people come to us. All our people are good. If you give us horses, we will pay you with buffalo robes which we will dress and give our agent.

GENERAL SANBORN

We have drawn up a treaty. Will you sign it now, or at the meeting in Spring?

BLACK FOOT

There are hard feeling between you and the Sioux and it is better to wait until spring, when you will meet them, and you can ascertain their feelings towards you. We will wait until you come to Phil Kearney and you can see all the Indians together. We will then sign the treaty.

APPENDIX B

LETTER, CROW EXHIBIT 4b

Fort Laramie, D.T.
May 20th 1868.

Hon. O. H. Browning.
Secretary of the Interior.
Washington, D.C.

Sir:

I have the honor to enclose treaties, concluded by the Indian Peace Commission, with the Crow Indians of Montana, and the Northern Cheyenne and Arrapahoe Indians. Upon these treaties, the Commission ask the favorable consideration and action of the Department and Senate.

In concluding them, we have conformed, as nearly as circumstances would permit, to the general plan and policy indicated, and adopted by the Commission, in its report last January.

We have had treaty relations with all these tribes before, but our treaties with them have been little more than an empty name; many of them have never seen an agent, nor received a present from the government, nor derived any benefit whatever from former treaties: we have therefore, made our stipulation with them as with a perfectly barborous people.

The Crows, owning mainly, to their friendly disposition by nature, have remained at peace with the whites, but the Cheyennes and Arrapahoes, sympathizing deeply with their relatives, who were slaughtered while supposing themselves under the protection of our government, at Sand Creek in 1864, have carried on a most cruel and relentless war against the whites since that

time. All these Indians have made these treaties, after the fullest explanations, and, no doubt, intend to comply strictly with their stipulations.

These treaties are made with the view of civilizing these Indians, and the terms and conditions are such as the Commission deem absolutely necessary to accomplish this end; hence the long time through which the benefits of the treaties extend. The Commissioners believe, that the Indians cannot become so far civilized, as to be self protecting and self supporting in less time than that occupied in the raising of one generation, and that, during this time, the policy and dealings of the government with them should be fixed and uniform. The expence incurred, in attempting to civilize Indians, in ten or fifteen years, unless followed up the succeeding years, is lost, and the Indian is left in a worse condition, than that preceeding such attempt.

It will be seen from the above, that in fixing the terms of such treaties, the Commission has been governed less by the considerations of the value of possessions ceded by the Indians, than by what they considered essential conditions to the maintenance of peace with and the civilization of the Indians: The whole expence of this thirty years effort to civilize, is no more than thirty weeks expence of actual war with them.

But, if the value of the possessions ceded is to be considered, then, for stronger reasons, the government should not hesitate to have the treaties ratified and executed: Mineral lands of exhaustless wealth and inconceivable value, extending over thousands of square miles, navigable streams, rivers of hundreds of miles in extent, on the banks of some of which, (the Muscel Shell), our capitalists have already invested more than a million dollars in mines of copper, that promise to exceed in richness any that have ever before been dis-

covered: large agricultural tracts, the finest on the eastern slopes of the mountains, are a portion of what these tribes have ceded by this treaty.

It is also of the utmost importance that these treaties should be ratified without unnecessary delay, and the appropriateness called for by them be made the present session of Congress.

The Game has, already, become very scarce in the Indian country that hitherto has furnished subsistence to these tribes: the country no longer supplies sufficient food or clothing, the Indians, must now depend to a great extent upon the government until they have learnt to cultivate the soil and raise crops.

The early commencement of the government to carry the treaties into effect, would satisfy the Indians at once of its good faith and fixed purpose, and would ensure peace and cooperation on the part of the Indians; while long delay produces discontent and discouragement and destroys, to a great extent, the benefits that otherwise would naturally flow from our treaties.

Hoping that the foregoing views may meet your approval and that of the Senate

I remain, very respectfully,
Your obedient servant

John B. Sanborn,
President, pro tem,
Indian Peace Commission